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IN THE

Supreme Court of the United States

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No. **217**.....

STATE OF OHIO EX REL. RODNEY P. LIEN, SUPERINTENDENT
OF BANKS OF THE STATE OF OHIO, IN CHARGE OF THE
LIQUIDATION OF THE OHIO SAVINGS BANK & TRUST
COMPANY,

Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF**

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*To the Honorable The Chief Justice and Associate
Justices of the Supreme Court of the United States:*

Your petitioner, the Superintendent of Banks of the
State of Ohio, respectfully represents and shows to the
court:

SUMMARY STATEMENT OF THE CASE

In this suit the Superintendent of Banks of the State
of Ohio, in charge of the liquidation of The Ohio Savings
Bank & Trust Company of Toledo, Ohio, seeks to recover
on behalf of the depositors and creditors of said Bank sums

of money which the Bank, before its enforced closing, advanced to Metropolitan Life Insurance Company upon mortgages owned by the latter. The advances were made by the Bank, as collection agent of Metropolitan, in the servicing of these mortgages in the Toledo area. They were made at the request of Metropolitan and for its benefit and convenience, and represented remittances by the Bank, in advance of collections, of sums due on the mortgages.

A comprehensive written stipulation of all of the controlling facts was entered into by the parties and (a jury being waived) the case was heard by the District Court for the Northern District of Ohio, Western Division, upon this stipulation (88), supplemented by a further oral stipulation (26) made at the trial, and by relatively unimportant testimony of four brief witnesses (28).

The trial court rendered an opinion (252) and made findings of fact and conclusions of law (272) upon which judgment was rendered in favor of Metropolitan.

The Circuit Court of Appeals, without opinion, entered an order of affirmance "in accordance with the findings of fact, conclusions of law, and opinion of the District Court."

The salient facts are taken from the stipulation of the parties (26, 88).

On August 24, 1920, the Bank and Metropolitan entered into a written contract (89), whereunder the Bank, as agent of Metropolitan, was to make collections in Metropolitan's behalf of all payments of principal and interest due on mortgages sold by the Bank to Metropolitan.

The agreement expressly provided (92) that the Bank did not guarantee the payment of any of said mortgages, either as to principal or interest, and, of course, Metropolitan, upon its purchase of said mortgages, became the absolute owner thereof and the Bank had no further interest therein except as such collection agent.

The compensation of the Bank for the servicing of these mortgages, as fixed by the contract and amended by subsequent correspondence (92, 98), consisted of all amounts of interest collected in excess of five and one-half per cent (5½%).

Paragraph 2nd of the contract (90) provided that the Bank "**as the agent of**" Metropolitan "will collect the principal amount of said mortgages or portions thereof, when and as the same mature, together with interest accrued and unpaid thereon, and will forward the same to" Metropolitan.

All mortgages, together with the notes secured thereby, which were subsequently sold by the Bank to Metropolitan, were endorsed and assigned by the Bank without recourse (92). The physical notes and mortgages were turned over to Metropolitan.

On January 21, 1926, in a letter (93) from the Bank to Metropolitan, the Bank, after calling attention to the fact that it had made advances in a few cases, said:

"We should like to ascertain at this time if it would be possible for us, in making our remittances, to specify the actual amount as paid by the mortgagor and permit you to credit this amount upon his note, **retaining the balance in an escrow fund until such time as the mortgagor has paid us, at which time we will advise you and you can make the proper credit upon your note.**

"As to the collections, you can readily see that we have had some difficulty although not serious, but only a question of a few weeks or a month's extension. It would be a much better arrangement if we could remit to you the actual amount that is paid by the mortgagor and as soon as collection is made of the balance, to forward that to you without having to advance it ourselves. In this way we would eliminate any possibility of misunderstanding between yourselves, ourselves and the mortgagor."

On June 26, 1926, the Bank wrote to Metropolitan as follows:

“Also, with reference to monthly remittances, we understand that we are to remit to your company on the 5th day of each month all payments of principal and interest **received** during the preceding month.”

It is not sought in this case by petitioner to recover from Metropolitan for any advances, comparatively few in number, which the Bank made to Metropolitan prior to July 1, 1926. Those advances were voluntary in character and were made without Metropolitan's knowledge or request. It is fair to say that prior to that time the Bank was only remitting to Metropolitan collections actually received, excepting in a few isolated cases where the Bank felt itself justified because of the reputation or integrity of the mortgagor to send remittances to Metropolitan which it had not actually collected.

On June 26, 1926, (93) the Bank was servicing only seventy-four (74) loans under the contract, totaling in the aggregate less than one-quarter of a million dollars.

About July 1, 1926, however, (97) Metropolitan made a bulk purchase of eight hundred sixty-four (864) mortgages, totaling \$4,033,810.00, and on December 4, 1930, (109) Metropolitan owned and the Bank was servicing in its behalf approximately thirty-one hundred (3100) mortgages, totaling about \$10,850,000.

Prior to July, 1926, it will be seen that the volume of business done under the agency contract between Metropolitan and the Bank was comparatively small, and while problems arose from time to time they were relatively unimportant.

By reason, however, of the bulk purchase of \$4,000,000 of mortgages in July of 1926, certain new complications came into existence which brought about major revisions

not only in the methods of operation under the 1920 contract but also in the contract itself.

On July 1, 1926, Metropolitan, in a letter (97) written to the Bank in response to the Bank's letter of June 26, 1926, above mentioned, stated:

"If occasionally you desire to allow a borrower a little time, **we prefer that you advance the payment to us when due.** This method will simplify matters greatly for us here."

On July 14th, after this bulk purchase was made of 863 mortgages, Metropolitan wrote to the Bank (99), stating:

"A situation has developed with reference to the monthly remittances covering the \$4,000,000.00 purchase which is a serious one, and we must find some way of overcoming it."

In this letter, Metropolitan also stated:

"We are required to receive here, all interest and principal payments **on the due date.** On this point, we have no choice in the matter, and furthermore, we would be subject to serious criticism by the Insurance Department of the State of New York. Not only that, but the loss of interest to us on so large a sum would amount to considerable in the aggregate during the year. How can you overcome this situation?"

In the last paragraph of this letter, Metropolitan suggests two methods of solving the difficulty and then says:

"Possibly it would be a good idea to have someone with authority from your institution come on here and discuss the matter with our cashier."

Such a conference as was requested by Metropolitan in this letter was held, and thereafter on July 29, 1926, the Bank sent a telegram (101) to Metropolitan as follows:

"In connection with your recent approval of approximately eight hundred and sixty-four mortgage loans

our executive committee has accepted **your** suggestion that we make weekly remittance of principal and interest instalments **as the same become due** with the understanding that **you will not credit such remittances on the notes except upon our written advice** that the said items have actually been paid by the mortgagors."

On July 30th, 1926, Metropolitan acknowledged receipt of this wire (101) and said:

"We hereby confirm the understanding that remittances received from you are not to be endorsed on the notes except upon your written advice."

And further,

"It is understood that we are not to send you advance statements of the payments **falling due** and that you will make the interest computations in your office and remit the items to us as they **become due** with the remittance sheet duly completed."

On July 31, 1926, in order to recapitulate the important changes thus effected in the servicing contract, the Bank wrote a letter to Metropolitan, the important parts of which follow (102):

"Summarizing our agreement with reference to your purchase of approximately 864 mortgage loans, having a total principal balance of more than four million dollars, which loans are more specifically described in schedules numbered 1 to 64, inclusive:

"The terms and conditions of this transaction are in accordance with our contract dated August 24, 1920, **with the following exceptions**, to-wit:

"4. Remittances of interest and principal instalments will be mailed by us on Saturday of each week, **covering amounts maturing during the weekly period** beginning with the preceding Saturday and ending with the preceding Friday. In the event that any Saturday shall fall on a bank holiday, then the weekly remittance to be mailed on such day shall be forwarded on the next succeeding business day.

"10. Remittance by us of any principal and interest instalments **will not be construed as evidence that the mortgagor has paid the same** and such remittance of principal and interest **will not be credited by you** on the mortgage notes **except upon written advise** from us that such instalments have actually been paid by the mortgagor."

Metropolitan acknowledged receipt of this letter on August 5, 1926, confirming the Bank's summarization of the Bank's modification of the existing agreement, and on September 2, 1926, (227) Metropolitan wrote a very significant letter to the Bank wherein it stated that under the modified arrangement the Bank was required to remit to it weekly for all items due, whether the Bank had collected the same or not, and then stated that it would bill the Bank monthly for all due items and that the Bank's remittances thereafter must conform to Metropolitan's billings. The exact wording of the important portions of this letter are as follows:

"We also enclose a statement showing the items due in July and August for which we have received no remittance, although most of the items were due several weeks ago. **The understanding was that you would remit to us weekly for all items due whether the same had been collected or not. This you have failed to do.**

"In order to avoid further confusion in regard to the matter, **we will hereafter send you, monthly, in advance of the due date, a statement of all items due** according to our records during the following month. **Your remittance must correspond** with the amount shown **due** on the statement sent you and be accompanied by an explanation if there should be a payment made in excess of the amount due quarterly. A statement of the items **due** during the current month will be sent you in a few days."

It is unfortunate that this letter last referred to was not embodied in the written stipulation of the parties. It

was produced from Metropolitan's files after the written stipulation had been made and filed. After its submission in evidence (27) as Exhibit No. 9 (227) it was mingled with a number of formal exhibits dealing with the methods used by the Bank and Metropolitan in handling the accounts, and apparently was entirely overlooked by the District Court during its consideration of the case, and similarly overlooked by the Circuit Court of Appeals. No mention of this letter is made in the opinion of the trial court. If it had been considered by the District Court, that court could not well have found that Metropolitan did not request its agent, the Bank, to make advances and that Metropolitan had no knowledge that such advances were being and were to be made. Such findings made by the District Court, and adopted by the Circuit Court of Appeals, are diametrically opposed to the living words of Metropolitan so clearly set forth in this letter.

As evidenced by this all-important letter, Metropolitan therewith sent the Bank a statement of all items due during July and August, and sent to the Bank thereafter, monthly in advance, a statement of all items due during each month following (107), and the Bank, in accordance with the positive instructions in this letter, made its remittances thereafter correspond with these billings of Metropolitan.

This letter is Metropolitan's own statement of the Bank's obligations under the contract as modified.

On December 2, 1930, the Superintendent of Banks of the State of Ohio wrote a letter to the Bank, the full text of which reads (109):

"It has come to the attention of this department that some banks in the state are acting as agents for life insurance companies, not only in placing mortgage loans on real estate, but also in collecting the interest and principal payments upon the loans so made.

"Our examinations show that a practice has developed of remitting the total amount of interest and principal on the due date, even though collections had not been made in full at that time, thereby creating an overdrawn condition of the account. This apparently has been done in order not to jeopardize the agency relationship with the insurance company.

"I must call your attention to the fact that this is contrary to law, and this is notice to you that if such practice exists in your institution it must be discontinued. Our examiners have been instructed to promptly report any violations.

"This notice is sent in behalf of what we consider the best interest of the banks, and we hope you will receive it in such spirit."

On December 4, 1930, C. A. Campbell, an officer of the Bank, wrote to Metropolitan (109) that he expected to be in New York on December 11th and would like to make an appointment on that date.

Mr. R. J. Slawson, manager of the Auditing Department of the Bank, on December 8, 1930, transmitted a letter to Campbell for the purpose of informing him as to the method in which the Bank was operating under its agency contract with Metropolitan and for the further purpose of aiding Campbell in handling the subject matter of the letter of December 2, 1930, from the Superintendent of Banks. Mr. Slawson's letter is an important one. Campbell, a witness for Metropolitan, on cross examination, stated that he received it and that he made no response thereto whatsoever (85). Mr. Slawson's letter reads (110):

"This is with reference to the letter of December 2 from Mr. O. C. Gray, Superintendent of Banks, concerning state banks acting as agents for life insurance companies in placing mortgages on real estate and collecting the interest and principal payments thereon; especially calling attention to banks remitting the principal and interest for these mortgages on the due date, even tho collections may not

have been made in full at that time, thereby creating an overdraft to the account. To aid you in the handling of this matter, I give you below the method with which these mortgages are handled in our bank.

"The name of the account which this bank carries is called Mortgage Loan Collections. **On the mortgages with the Metropolitan Life Insurance Company, we advance the principal and interest whether or not collections have yet been made.** For the mortgages with the Aetna Life Insurance Company and the Connecticut General Life Insurance Company, we do not advance the principal and interest payments, but remit after collection has been made.

"There is nothing in our written agreement with the Metropolitan Life Insurance Company which states that it is a requirement that The Ohio Savings Bank & Trust Company repurchase any of the mortgages sold to them in the event of payments becoming delinquent by the customer, and **while we do advance payments to the Metropolitan Life Insurance Company, our written agreement with them is that money advanced will not be credited to the note and mortgage without our written instructions to do so.**

"The major portion of the time, the Mortgage Loan Collection Account is a debit balance. There are a few occasions, for a short period, where the account is not overdrawn, however, for these agency collections, our income therefrom is $\frac{1}{2}$ of 1% and amounts to approximately \$62,000.00 per annum, revenue."

Mr. Campbell, who was one of the vice-presidents of the Bank, accompanied by Mr. Robert C. Dunn, trust officer and vice-president of the Bank, on December 9, 1930, went to Columbus to confer with Mr. Gray, the then Superintendent of Banks of the State of Ohio, regarding the matters covered by Mr. Gray's prior letter. Obviously, they must have taken with them the letter written by Slawson to Campbell for their information and assistance.

Upon their return to Toledo, Mr. Campbell and Mr. Dunn made a brief joint report on what occurred at Colum-

bus to Mr. George M. Jones, the president of the Bank. This report is as follows (112):

"In compliance with your request, we went to Columbus on Tuesday, December 9, and there talked with O. C. Gray, Supt. of Banks, on the subject of his form letter addressed to all state banks under date of December 2 and requesting discontinuance of the practice of remitting due but unpaid installments of interest and principal on mortgages owned by insurance companies and acquired by purchase from the banks.

"We reviewed the general practice of selling mortgages to insurance companies and, with reference to our own situation, we made full explanation of the manner in which we have handled such business for the past several years. We advised Mr. Gray that, in our opinion, the sale of mortgages to insurance companies is desirable for the reasons that, it brings large sums of money into the community, it enables us to care for the mortgage requirements of a great many more customers than would be otherwise possible and it is profitable to the bank.

"We further referred to the fact that our contract with the Metropolitan Life Insurance Co., dated August 24, 1920, specifically recites that the bank does not guarantee the payment of the principal and interest in connection with the sale of mortgages and we also called attention to the agreement of said insurance company that remittances received from our bank are not to be endorsed on the notes except on our written advise.

"After full consideration, Mr. Gray stated that, he is entirely satisfied with the manner in which our bank has been handling such items; that the examiners for the State Banking Department will be informed accordingly, and that his form letter of December 2, addressed to all state banks, need not be interpreted as applying to our situation."

At the instance and request of the Superintendent of Banks, and in order to clarify in writing any question regarding the applicability of Metropolitan's agreement (not

to credit remittances) to all of the mortgages purchased by it without recourse from the Bank, the Bank, on December 17, 1930, sent the following letter to Metropolitan (113):

"We wish to refer you to your letter to us dated July 30th, 1926. In this letter was expressed an understanding that remittances by us on account of mortgage obligations, were not to be endorsed on the notes, except upon our written advice. This understanding was intended to continue to cover all mortgage purchases, but the only evidence in writing of this understanding, is that which is incorporated in your letter above referred to, and by its wording is restricted to the then purchase of approximately 864 mortgage loans.

"The State Banking Department has called attention to this written limitation of understanding in respect to endorsements, and we therefore ask that you kindly write to us to the point that you confirm our mutual understanding that remittances by us are not to be regarded as actual payment by the mortgage obligors, and that such remittances are not to be endorsed upon the notes except upon our written advice, and that this mutual understanding covers all loans now purchased or to be purchased in the future.

"Thanking you very kindly for your prompt response, we are."

This letter was answered by Metropolitan on December 22, 1930, as follows (114):

"Referring to your letter of December 17th, 1930, this is to advise you are entirely correct in your understanding that we do not credit on the mortgage papers remittances made by your bank covering items due in connection with the mortgage loans you have sold to us. This has been our practice in the past and will continue to be so, as such remittances are not endorsed on the notes except upon your written advice.

"I believe this has been our mutual understanding covering all loans which we purchase from your bank, and this letter is merely to confirm the understanding."

This exchange of letters is significant. It will be noted that the Bank asks Metropolitan to confirm the mutual understanding that remittances **are not to be regarded as actual payment by the mortgage obligors**, and that Metropolitan does confirm this understanding by saying that it does not credit on the mortgage papers remittances of the Bank except upon the Bank's written advice. Obviously, Metropolitan uses the expressions, "endorsement" or "credit" on the "mortgage papers" or "notes" in the sense that the remittances are not to be regarded as payments or credits against the mortgage obligations in the absence of specific instructions or advice from the Bank.

This seems particularly so on account of the fact that it was Metropolitan's uniform and invariable practice and custom never to make physical endorsements of remittances upon the notes held by it (56). Metropolitan, therefore, by agreeing not to physically endorse such remittances on the notes, would have been agreeing merely to continue its long established system. This would have been pointless.

As shown by a letter from Metropolitan of December 22, 1930, (113), Mr. Campbell, prior to that date, made a visit in New York to Metropolitan. Upon that visit he (109) delivered to Metropolitan a copy of the letter received by the Bank from the Superintendent of Banks dated December 2, 1930, and, as he said on the witness stand, made a truthful and complete report to Metropolitan of what he and Mr. Dunn had said and done at Columbus in their conference with the Superintendent of Banks.

In its letter of May 12, 1931, (114), the Bank advised Metropolitan that as of that date the advances which it had made to Metropolitan in excess of actual collections from mortgagors was in excess of \$150,000.

Metropolitan at no time prior to the date the Bank closed, made any request for a detailed statement of the

advances made by the Bank (107), and consequently the Bank never furnished Metropolitan up to that date such a detailed statement.

The Mortgagors were purposely kept in complete ignorance of the fact that the Bank was making advances to Metropolitan and the Bank at no time credited such advances to the mortgagors upon its mortgage loan records.

The Bank ceased doing business August 17, 1931, and was, on that date, taken over by the Superintendent of Banks for liquidation.

On February 27, 1932, the Superintendent of Banks gave to Metropolitan (125) a complete list in detail showing the Metropolitan number and the Bank number of each loan, and in two columns the amount of principal and interest advanced to Metropolitan by the Bank.

There was a large volume of advances made by the Bank after December, 1930, (67). There was a severe run on the Toledo banks both before and after June 15, 1931. The other local banks, including The Ohio Savings Bank and Trust Company, were on a restricted basis from June 15, 1931, until August 17, 1931, when the Ohio Bank failed. In this situation, it is no wonder that the advances made to Metropolitan by the Bank during the last three months of its life were, of necessity, disproportionately large.

As of the date of the closing of the Bank it had remitted to Metropolitan \$477,789.06 in excess of amounts collected by it for Metropolitan from or on behalf of the mortgagors. From the time of the closing of the Bank, either by offsets, payments, or compromises, the Superintendent of Banks has received credits against the amount of its outstanding advances as of the date of the Bank's closing, so as to reduce as of the date of the trial (68) these outstanding advances to an aggregate stipulated figure of \$253,811.29.

JURISDICTION AND OPINIONS BELOW

The judgment of the Circuit Court of Appeals sought to be reviewed and reversed, was entered on March 12, 1942, (295). And the order denying the petition for rehearing was entered on April 14, 1942, (303).

The jurisdiction of this court is invoked under Title 28, U. S. C. A., Section 347.

The opinion of the District Court (252) is reported in 36 Federal Supplement 457.

The Circuit Court of Appeals entered judgment of affirmance without opinion, the order therefor stating that it was "in accordance with the findings of fact, conclusions of law, and opinion of the District Court" (295).

THE QUESTIONS PRESENTED

1. A state bank was acting as collection agent for an insurance company upon numerous mortgages owned absolutely by the latter. Under its written agency contract, as amended by subsequent correspondence, it was obligated to advance to its principal all due items of principal or interest, whether collected by it or not. Such advances were made upon a specific understanding that they would not be treated as actual payments by the principal except upon written advice by the agent that they had been collected from the mortgagors. Upon the termination of the agency, is not the agent entitled to recover from the principal such advances for which it has not been reimbursed?

2. Where such advances were made at the request of the principal and pursuant to the Bank's express obligation under the agency contract, so amended, is the Bank to be classed as a volunteer under the law in making them?

3. Where the mortgagors have no knowledge and have purposely been kept in ignorance of the fact that such ad-

vances have been made with respect to their mortgages, can it be justifiably held in a suit for reimbursement against its principal that the Bank volunteered such advances for the benefit of such ignorant mortgagors?

4. Are not such unrepaid advances beneficially the property of the statutory liquidator of the Bank and its depositors and creditors?

5. If such unrepaid advances are to be treated as voluntary payments which the Bank was not legally obligated to make, are not such advances *ultra vires* and recoverable by the Superintendent of Banks for the benefit of his trust?

6. In view of the stipulated fact that the Bank endorsed the mortgage notes and mortgages to the insurance company without recourse (92), and the agency agreement expressly provided (92) that the Bank did not guarantee the mortgages which the insurance company purchased and owned, either as to principal or interest, are not these advances, if treated as payments, illegal and therefore recoverable by the statutory receiver of the Bank?

REASONS RELIED ON FOR ALLOWANCE OF WRIT

A. The controlling findings of fact of the District Court (adopted by the Circuit Court) are clearly erroneous and are in direct opposition to the facts which were stipulated to be true by the parties.

B. The Circuit Court having (without opinion) summarily sanctioned the diametrically inconsistent position of the trial court, the case calls for the exercise of this court's supervisory power.

C. The decisions below on important questions of Ohio law, dealing with the rights of the State Liquidator of an Ohio Bank, conflict with applicable local law.

Wherefore, your petitioner prays that a writ of *certiorari* issue under the seal of this Honorable Court, di-

rected to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this court for review a full and complete transcript of the record and of the proceedings in Case No. 8977 entitled on its docket, "*State of Ohio ex rel. Rodney P. Lien, Superintendent of Banks of the State of Ohio, in Charge of the Liquidation of The Ohio Savings Bank & Trust Company, Toledo, Ohio, Appellant, vs. Metropolitan Life Insurance Company, Appellee,*" and that said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper.

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